IN HARMONY:

THE PUBLIC INTEREST AND THE PRIVATE INTERESTS OF ALBERTA MUNICIPAL COUNCILLORS

November 1985

Honourable Julian Koziak
Minister of Municipal Affairs
224 Legislature Building
Edmonton, Alberta

Dear Mr. Minister:

The undersigned have the honour to submit to you a report

"IN HARMONY:
THE PUBLIC INTEREST AND THE PRIVATE INTERESTS OF
ALBERTA MUNICIPAL COUNCILLORS".

Respectfully submitted:

Reeve Wallace Daley

Mayor Doug Fee

Tom Forgrave

INTRODUCTION

In November 1984, the Honourable Julian Koziak, Minister of Municipal Affairs, appointed a Conflict of Interest Advisory Committee consisting of Reeve Wallace Daley (President, Alberta Association of Municipal Districts and Counties), Mayor Doug Fee (President, Alberta Urban Municipalities Association) and Tom Forgrave (Assistant Deputy Minister, Alberta Municipal Affairs).

The Terms of Reference required the committee to review sections 29 - 35, Municipal Government Act, sections 23 - 35, Legislative Assembly Act and the legislation in other provinces. It was directed to produce a preliminary report which would be distributed for discussion and comment and a final report by November, 1985. Any resulting legislation was to be presented to the Legislative Assembly at the 1986 Spring Sitting so that it could be enacted well in advance of the 1986 general municipal elections.

In April 1985, the committee released a preliminary report which reviewed the development of the Municipal Government Act provisions, the Legislative Assembly Act, the provisions in other provinces and submissions received from municipalities and individuals. The report proposed several principles to guide the preparation of new legislation and provided the rationale for each principle.

This preliminary report was distributed to each municipality for comment. The major principles received wide coverage in the news media both at the time of its release and subsequently when local councils were reviewing it.

The preliminary report was the subject of workshops at the 1985 Federation of Canadian Municipalities Conference in Calgary and the Elected Officials Symposium in Jasper. It has also been the subject of discussions at the Alberta Association of Municipal Districts and Counties and the Alberta Urban Municipalities Association annual conventions and at various zone or regional meetings of both elected and appointed officials.

Comments on the preliminary report were received from:

Municipal District of Cypress
Town of Grande Cache
Improvement Districts Association of Alberta
County of Lethbridge
Town of Morinville
Town of Peace River
Mayor R. J. McGhee, Red Deer
Municipal District of Sturgeon
Town of Swan Hills
Town of Vulcan
Council of Municipalities of West Central Alberta
Town of Whitecourt.

The committee has appreciated the advice and comments it has received at these meetings and in the direct submissions.

In this, its final report, the committee will review the principles proposed in the preliminary report and propose legislation.

THE PRINCIPLES REVIEWED

1. TITLE

The committee proposed that the term "conflict of interest" should not be introduced. There has been unanimous support for this proposal.

2. SEPARATE ACT

The committee proposed that the disqualification provisions should continue to be included in the Municipal Government Act. This principle was also widely supported except if the provisions are to apply to other than municipal elected officials, in which case a separate Act would be supported.

3. STATUTORY DISQUALIFICATION

The committee proposed that:

"A person should not be qualified to remain a member of council who

(a) ceases to be eligible to be nominated as a candidate under the Local Authorities Election Act
(b) is absent for three consecutive regular meetings of the council unless the council, by resolution, authorizes the absence
(c) is sentenced to imprisonment for more than three months for an offence under any federal or provincial Act.

When a member is disqualified under this part he should resign and if he does not resign the council should, by resolution, request the Minister to declare the member's seat vacant. Upon being satisfied that the facts are correct, the Minister should declare the seat vacant and direct that a by-election be held or that the seat remain vacant until the next general election in accordance with the Municipal Government Act and the Local Authorities Election Act.

A member who is disqualified:

(i) under (a) should be eligible for nomination for the next general election after the disqualifying factor has been eliminated
(ii) under (b) at the next general election
(iii) under (c) at the next general election after he has fulfilled the terms of the sentence."

COMMENTS

The committee subsequently noted that the provision of the existing section 29(1)(g) had been unintentionally omitted.

It was pointed out to the committee that the "three regular meeting" provision imposed different limitations on councillors dependent on the frequency of regular council meetings. The committee agrees with this representation and is recommending a two month time period rather than three meetings.

Concerns were also expressed as to whether it is appropriate to place upon the Minister of Municipal Affairs responsibility for disqualifying a member of council. Originally the committee was of the view that such decisions would involve matters of fact and that the cost of court-proceedings could be avoided. However, upon further reflection, the committee recognizes that matters of judgement may well be involved (e.g. determining where a person is resident) and therefore, has concluded that there should be a right of appeal of a disqualification decision of the Minister.

4. DEFINITION OF INTEREST

The committee proposed that:

"A member of council should be deemed to have an "indirect pecuniary interest" in any matter before the council
(a) affecting a private company in which he is a shareholder, director or senior officer
(b) affecting a public company in which he owns equity shares carrying more than 10% of the voting rights attached to all equity shares of the company for the time being outstanding or is a director or senior officer
(c) affecting a partnership or firm of which he is a member, or
(d) affecting a private or public company, partnership, firm or person of which he is an employee.

"Direct pecuniary interest" should be defined as an interest of the member which may be measured monetarily."

COMMENTS

The committee has subsequently received advice that in practice there appears to be no distinction made between "direct" and "indirect" pecuniary interest. The committee is, therefore, removing those terms from its recommendation which may help to remove some of the confusion as to what constitutes an interest.

5. FAMILY RELATIONSHIPS

The committee proposed that:

"The interests of the spouse, children or parents of the member, if known to the member or of which he reasonably should have known, should be deemed to be the interests of the member".

COMMENTS

The clarification of family relationships has generally been welcomed. It has been suggested that the "parents of the spouse" should also be included.

6. EXCLUSIONS

The committee proposed that:

"A member should not be considered to have a direct or indirect interest by virtue of any interest that he may have

(a) as an elector, taxpayer, or utility customer of the municipality
(b) by reason of his appointment by the council as a director of a company incorporated for the purpose of carrying on business for and on behalf of the municipality or by reason only of his being appointed as the representative of the council on any board, commission, committee or other body

(c) with respect to any allowance, honorarium, remuneration, salary or benefit to which he may be entitled by reason of being a member of the council or by reason of having been appointed by the council to a position described in (b)

(d) by reason of his employment by the Government of Canada, the Government of Alberta, a federal or provincial crown corporation or agency, another municipality, a school board, a hospital or nursing home board, a senior citizen foundation, a local board of health or a library board

(e) by reason of his being a member of a credit union, cooperative or a non-profit organization formed under the Societies Act or the Agricultural Societies Act or a service club except if he is an employee of the organization

(f) by reason of his appointment as the chief or other officer of a volunteer fire department, volunteer ambulance service or volunteer emergency measures organization or of remuneration received as a member of one of those voluntary organizations

(g) by reason of having an interest which is an interest in common with the majority of electors of the municipality or if the matter affects only part of the municipality with the majority of electors in that part, or

(h) by reason of an interest which is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member."

COMMENTS

This proposal has been generally supported as clarifying a number of situations which are unclear under the existing legislation.

Most comments received were related to item (d). The arguments advanced were generally that this provision would extend to public employees a right which is not available to employees of private enterprise and that public employees may just as easily be recompensed by favorable promotions or indiscrete bonuses of some kind as may employees of private enterprise.

Upon considering this further the committee has concluded that a councillor who is an employee of another local government organization may well be put in a very difficult position if he or she is required to vote on a matter affecting that organization. A similar difficulty may face a federal or provincial employee regarding a matter affecting the department or agency by which he or she is employed.

The committee has, therefore, removed the exemptions for local government employment and for matters affecting the employing federal or provincial department or agency from its final recommendation.

7. DISCLOSURE OF INTEREST

The committee proposed that:

"When a member has an interest in a matter before the council, any committee of council, or any board, commission, committee or agency to which he is appointed as a representative of the council, he should disclose his interest prior to any discussion on the matter. The disclosure should be recorded in the minutes of the meeting. In disclosing the interest, the member should state that he has an interest and describe its nature in general terms. It should not be necessary for the member to disclose the extent of his interest.

If after commencement of the discussion of a question a member realizes that he has an interest of which he could not reasonably have been aware at the outset, he should immediately disclose his interest as provided above."

COMMENTS

This proposal was generally accepted.

8. AFTER DISCLOSURE

The committee proposed that:

"After disclosing his interest the member should abstain from any debate on the matter, should not vote on it and should abstain from in any way attempting to influence the decision.

After disclosing an interest the member should leave the room in which the meeting is being held until the matter is disposed of.

The member should not be required to leave the room where the matter is the payment of an account for an expenditure of the municipality which has previously been committed.

Where the member under the Municipal Government Act or any other Act has a statutory right to be heard by the council he should be allowed to answer questions posed by other members of the council on the facts or substance of the matter."

COMMENTS

This proposal was generally accepted. It was suggested, however, that a member of council having a statutory right to be heard should be able to exercise that right in the same manner as any other person.

9. IF ABSENT

The committee proposed that:

"If the member is temporarily absent from the meeting during the time when a matter in which he has an interest is discussed, he should upon returning to the meeting comply with the disclosure provisions."

COMMENTS

This proposal aroused considerable comment. Most suggested that a councillor who is not present during a discussion cannot influence the decision. The committee recognizes that in fact the member would not be part of the discussion whether he declared an interest and left the room or was absent for some other reason. However, the disclosure provisions could be avoided by simply leaving the room prior to the discussion and returning after it. The committee recommends that this provision be included in the legislation.

10. PRIOR RULING

The committee proposed that:

"If a member is not certain whether or not he has an interest which should be disclosed, he should be able to make an application to a judge prior to the meeting for direction as to whether or not he should make a disclosure and abstain from voting.

If the judge determines that he does not have an interest which requires disclosure there should be no further action possible regarding his disclosure or voting on the question."

COMMENTS

This proposal was objected to on several counts. Access to a judge is limited in many municipalities and even where judges are relatively easily accessible, it may be difficult to obtain the direction in the time available between identifying the issue and the meeting at which it was to be considered. Also, a person, even through oversight, may not fully disclose the circumstances to the judge and therefore the decision should be subject to appeal.

The committee has not included this proposal in its final recommendation.

11. FAILURE TO DISCLOSE OR ABSTAIN

The committee proposed that:

"When an elector ascertains that a member may have failed to disclose an interest or to abstain from voting or influencing a decision in which he had an interest, the elector should be able to apply to a judge for an order disqualifying the member within six weeks of becoming aware of the alleged contravention but not later than six years after the date it is alleged to have occurred.

When a council is concerned that one or more of its members may have contravened the disclosure provisions the council should, by resolution, be able to apply to a judge for an order

(i) to determine whether or not there has been a contravention, or
(ii) to disqualify the member(s) for a contravention."

COMMENTS

A number of objections were received to the 6 weeks, 6 years limitations on actions. In general, the submissions suggested that applications should be made during the term of office in which the alleged contravention occurred. The committee is recommending that the application must be made within three years of the alleged contravention of the Act.

12. POWERS OF JUDGE

The committee proposed that:

"Upon hearing an application by an elector or by a council, the judge should be able to

(a) dismiss the application
(b) disqualify the member and declare his seat vacant
(c) require the member or former member to make restitution for any personal financial gain resulting from the contravention
(d) determine that a contravention was inadvertent or by reason of a bona fide error in judgement and therefore declare that the member or former member is not subject to disqualification or to having his seat declared vacant."

COMMENTS

This proposal was generally accepted.

13. APPEAL

The committee proposed that:

"The applicant elèctor or council or an affected member should be able to appeal the decision of the judge in accordance with normal court procedures."

COMMENTS

This proposal was generally accepted.

14. COSTS ON DISMISSAL

The committee proposed that:

"If the judge dismisses the application, the costs and expenses of the member alleged to have been in contravention of the provisions should be an expense of the municipality and a municipality should be able to contract for insurance for this purpose."

COMMENTS

A number of comments were received to the effect that where an application is dismissed, neither the affected council member nor the municipality should be required to pay the costs and expenses of the member. The judge should be able to assess the costs against the applicant.

OTHER CONCERNS

The committee noted that the existing section 29(1)(f), Municipal Government Act, had been omitted from its preliminary report. It is included in the final recommendation.

While there was general support for a member being able to do business with the municipality providing that he did not take part in the decision to award the business, some concern was expressed regarding municipalities where authority to award contracts had been delegated to administrative officials. In such cases, the councillor could put undue pressure on the administrative official. Therefore, the committee is recommending that any contract in which a member of council has an interest must be awarded by the council.

This poses an additional difficulty in larger municipalities where it may be difficult for administrative officials to identify which businesses members have an interest in and therefore which contracts require council approval. Therefore, the committee is proposing an enabling provision to permit a council to require its members to inform the municipal secretary of businesses in which they have an interest and the secretary to make the list available to the appropriate administrative officials.

RECOMMENDATION

Having considered all of the comments and submissions, the committee recommends that sections 29 to 35 of the Municipal Government Act be repealed and that the following be substituted:

"29(1) A person who

(a) ceases to be qualified for nomination under the Local Authorities Election Act,

(b) is a judge of a court or is a member of the Senate or House of Commons of Canada or of the Legislative Assembly of Alberta,

(c) is absent from the regular meetings of the council for 2 consecutive months unless the absence is authorized by resolution of the council, or

(d) is sentenced to imprisonment for 3 months or more for an offence under any Act of Alberta or of Canada

is not qualified to remain a member of a council.

(2) A resolution referred to in subsection (1)(c) must be passed prior to the conclusion of the last regular meeting of the council during the 2 month period.

(3) If a member is not qualified under this section to remain a member of the council the member shall forthwith resign.

(4) If the member referred to in subsection (3) does not resign, the council may apply to the Minister for an order declaring the member disqualified and the member's seat on the council to be vacant.

(5) If the Minister receives an application under subsection (4) and is satisfied that the facts are correct, the Minister may issue an order

(a) declaring the member to be disqualified,

(b) declaring the member's seat on the council to be vacant, and

(c) giving directions in accordance with this Act and the Local Authorities Election Act regarding the conduct of a by-election.

(6) Notwithstanding section 24, Local Authorities Election Act, a member who is disqualified under section 29 is eligible to be elected at the next ensuing general election in the municipality if otherwise qualified for nomination under the Local Authorities Election Act.

30(1) In this section and section 31,

(a) "corporation", "distributing corporation", "shareholder", "voting shares", "voting rights", "director" and "officer" have the same meanings as they have in the Business Corporations Act;

(b) "pecuniary interest" means an interest in a matter that could monetarily affect

(i) the member of council,

(ii) a corporation that is not a distributing corporation in which the member is a shareholder, director or officer,

(iii) a distributing corporation in which the member beneficially owns voting shares carrying at least 10% of the voting rights attached to the voting shares of the company or of which the member is a director or officer,

(iv) a partnership or firm of which the member of council is a member, or

(v) a corporation, partnership, firm, government or person that employs the member of council.

(2) For the purposes of this section and section 31, the pecuniary interest of the spouse, children, parents of the member or parents of his spouse, if known to him or of which he should reasonably know, shall be deemed to be the pecuniary interests of the member.

(3) A member of council does not have a pecuniary interest by reason only of any interest that he may have

(a) as an elector, taxpayer, or utility customer of the municipality,

(b) by reason only of his appointment by the council as a director of a company incorporated for the purpose of carrying on business for and on behalf of the municipality or by reason only of his being appointed as the representative of the council on any board, commission, committee or other body,

(c) with respect to any allowance, honorarium, remuneration or benefit to which he may be entitled by reason of being a member of the council or by reason of having been appointed by the council to a position described in (b),

(d) by reason of his employment by the Government of Canada, the Government of Alberta, a federal or provincial crown corporation or agency, except with respect to a matter affecting the department or agency of which he is an employee,

(e) by reason of his being a member of a credit union, cooperative or a non-profit organization formed under an Act of Alberta or of Canada or a service club,

(f) by reason of his appointment as the volunteer chief or other volunteer officer of a volunteer fire department, volunteer ambulance service or volunteer emergency measures organization or of remuneration received as a volunteer member of any of those voluntary organizations,

(g) by reason of having an interest that is an interest in common with the majority of electors of the municipality or, if the matter affects only part of the municipality, with the majority of electors in that part, or

(h) by reason of an interest that is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member.

(4) Clauses (e) and (f) of subsection (3) do not apply to a member of council who is an employee of a credit union, cooperative, organization or club referred to in those clauses.

(5) When a member has pecuniary interest in a matter before the council, any committee of the council, or any board, commission, committee or agency to which he is appointed as a representative of the council, the member shall

(a) disclose the general nature of the pecuniary interest prior to any discussion of the matter,

(b) subject to subsection (7), abstain from any discussion of the matter and from voting on any question relating to it, and

(c) subject to subsections (6) and (7), leave the room in which the meeting is being held until the discussion and voting on the matter is concluded.

(6) If the matter with respect to which the member has a pecuniary interest is the payment of an account for an expenditure that has previously been committed, it is not necessary for the member to leave the room.

(7) If the matter with respect to which the member has a pecuniary interest is a question on which, under this or any other Act, the member as an elector or property owner has a right to be heard by the council

(a) it is not necessary for the member to leave the room, and

(b) the member may exercise the right to be heard in the same manner as any person who is not a member of the council.

(8) If a member is temporarily absent from a meeting when a matter in which he has a pecuniary interest is introduced, he shall immediately upon his return to the meeting or as soon thereafter as he becomes aware that the matter has been considered, disclose the general nature of his interest in the matter.

(9) The abstention of a member under subsection (5) and the disclosure of a member under subsection (8) shall be recorded in the minutes of the meeting.

(10) A member who contravenes this section is not qualified to remain a member of the council.

31(1) No contract or agreement with the municipality under which a member of council has a pecuniary interest is binding on the municipality unless

(a) the contract or agreement is for the performance of work or the provision of a service in the case of an emergency, or

(b) the contract or agreement has been approved by the council.

(2) A council may by by-law

(a) require that each member of the council file with the municipal secretary a statement of every interest as defined in section 30 which the member has, and

(b) require the municipal secretary to compile a list of all the interests reported on the statements of the members of council and to provide the list to those officials of the municipality who have authority to award contracts or make agreements

and the by-law may contain such provisions as are necessary in the opinion of the council to implement the intention of this section.

(3) A person who contravenes a by-law passed pursuant to subsection (2) is guilty of an offence and liable to a fine of not less than $100 nor more than $1,000.00.

(4) A member who has a pecuniary interest in a contract or agreement with the municipality other than a contract or agreement referred to in clause (a) or (b) of subsection (1) is not qualified to remain a member of the council.

(5) A person is not qualified to remain a member of the council if he uses information gained through his position as a member of the council to gain a pecuniary benefit in respect of any matter in which he has a pecuniary interest.

32(1) If a person is not qualified to remain a member of the council under section 30 or 31, he shall forthwith resign his seat on the council.

(2) If the member does not so resign

(a) the council may apply by originating notice to a judge of the Court of Queen's Bench for

(i) an order determining whether or not the member is qualified to remain a member of the council, or

(ii) an order declaring the member to be disqualified to be a member of the council,

or

(b) an elector who

(i) files an affidavit showing reasonable grounds for believing that a member of council never was or has ceased to be qualified as a member of the council, and

(ii) pays into court the sum of $250 as security for costs may apply by originating notice to a judge of the Court of Queen's Bench for an order declaring the member to be disqualified to be a member of the council.

(3) On hearing an application under this section and any evidence, either oral or by affidavit that he requires, the judge may make an order

(a) declaring the member to be disqualified and his seat on the council to be vacant,

(b) declaring the member to be qualified to remain a member of the council, or

(c) dismissing the application

with or without costs.

(4) If a judge declares a member of a council disqualified for a contravention of section 31, he may order the disqualified member to pay to the municipality the total amount of any profit made in contravention of that section.

(5) An application under this section shall not be made later than 3 years after the date the contravention is alleged to have occurred.

(6) An application under this section may be commenced or continued notwithstanding that an election has been held between the time when the disqualification of the member or the former member of the council is alleged to have arisen and the time at which the application is or was commenced and whether or not the member in respect of whom the application is being brought

(a) resigns before or after the election,

(b) was re-elected in the election,

(c) was not re-elected or did not run in the election, or

(d) has completed a term of office.

34(1) The decision of the Minister pursuant to section 29 or of a judge pursuant to section 32 or 33 may be appealed to the Court of Appeal.

(2) A person who is declared disqualified pursuant to section 32 and appeals that declaration remains disqualified until the final determination of the appeal.

(3) If, on the final determination of the appeal, the disqualification is set aside

(a) the Court shall reinstate the member of the council for any unexpired portion of the term of office for which he was elected and require any person who has been elected to fill the balance of that term to vacate the office, and

(b) the Court may order that any money paid to the municipality pursuant to section 32(4) be paid back to the member.

(4) If, on the final disposition of the appeal, the disqualification is set aside but the term of office for which the member was elected has expired, he shall not be reinstated, but he is eligible to be elected at the next ensuing election in the municipality, if otherwise qualified.

35(1) If an application under section 32 is dismissed, or an order is issued declaring the member qualified to remain a member of the council, the council may reimburse the member in respect of whom the application was made for any of his costs and expenses that the council considers reasonable excepting those costs that may have been awarded by the judge.

(2) A council may contract for insurance in respect of payments under subsection (1)."

The committee further recommends that, consequential to its main recommendation,

(a) section 87 of the Municipal Government Act be repealed and the following be substituted:

"87. No member of the council is eligible for appointment to any municipal office other than that of

(a) mayor, deputy mayor or acting mayor

(b) volunteer chief or other volunteer officer of a volunteer fire department, volunteer ambulance service or volunteer emergency measures organization."

(b) section 22 of the Local Authorities Election Act be amended

(i) by repealing subsection (1)(a)

(ii) by adding after subsection (1):

"(1.1) Subsection 1(h) and (i) do not apply to a candidate for election to a council."

APPENDIX

Election Contributions Disclosure

Although not included in any of the formal submissions to the committee, questions have been raised on several occasions as to why there was no mention of the disclosure of election campaign contributions in the preliminary report.

For the vast majority of municipal councillors, campaign expenses are so insignificant that either donations are not sought or are of such minimal amounts that they could not be reasonably regarded as likely to influence the member. The committee is, therefore, opposed to blanket disclosure provisions applicable to all municipalities.

However, in recognition of the interest in this subject in some municipalities, the committee is including as an appendix to the main report a suggestion for a permissive provision which could address the issue. Such a provision might read as follows:

(1) A council may pass an Election Contributions Disclosure Bylaw.

(2) A bylaw under this section may require that

(a) all financial contributions accepted by or on behalf of a candidate for election to the council which as a single contribution or in the aggregate from a single contributor exceed

(i) $40, or

(ii) such greater amount as may be prescribed in the bylaw shall be reported to the Returning Officer by each such candidate in the form prescribed in the bylaw;

(b) the form referred to in clause (a) shall be received by the Returning Officer by a certain time which shall not be earlier than 30 days after election day;

(c) the candidate report the total of all contributions which as a single contribution or in the aggregate from a single contributor do not exceed the amount established pursuant to clause (a).

(3) The form prescribed in the bylaw may require

(a) the name and address of the contributor;

(b) the amount of the contribution;

(c) the date on which the contribution was received by or on behalf of the candidate, and

(d) the total amount of all contributions not exceeding the amount set out in the bylaw.

(4) A bylaw under this section shall be passed not later than

(a) June 30, 1986, or

(b) in subsequent years 120 days prior to the next ensuing general election day

and remains in effect until it is amended or repealed.

(5) A person who contravenes a bylaw under this section is guilty of an offence and is liable to a fine of not more than $1,000."

Such a provision would enable election contribution disclosure requirements where a council thought them necessary and, significantly, would leave the decision at the local level.

Because the issue was not addressed in the preliminary report, the committee does not consider it appropriate to include this suggestion as a primary recommendation.